In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-30

Ben Klein, *Petitioner*

v.

United States of America, *Respondent*

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ben Klein
Pro Se
1738 Pearl
Denver, CO 80203

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-30

Ben Klein, *Petitioner*

v.

United States of America, *Respondent*

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I.

1. Does the two year limitation period, required by Rule 33 of the Fed.R.Crim.P. for filling a Motion for a New Trial based on the ground of newly discovered evidence, run from a final sentence pursuant to 18 USC 4208(b), now 18 USC 4205(c).

In his memorandum in opposition to our Petition the Honorable Solicitor General doesn't deny or dispute the following pertinent facts as set forth in the Petition, and they are thus admitted.

(a) That the Petitioner was sentenced pursuant to 18 USC 4208(b), now 18 USC 4205(c).

(b) That the Court pursuant to 18 USC 4208(b) sentenced the Petitioner not once, but twice, the first being the maximum and the final sentence being probation on February 9, 1976.

(c) That the governments response in the trial court to Petitioner's Motion for a New Trial did not deny the allegations of said Motion for New Trial (Pet-4).

(d) That counsel for both sides knew nothing of Judge's order denying Motion for New Trial.

(e) That after an inquiry, the Clerk's Office in Denver was contacted by Judge Bratton, and as a result thereof copies of the order were mailed to all Counsel. Thus, both sides knew of the ruling on October 23, 1978 (Pet App D1-D3).

(f) That the Petitioner upon receipt of notice of said order by Judge Bratton immediately filed Notice of Appeal and Motion to Vacate.

None of the cases cited by the Solicitor General in his memorandum involve a sentence pursuant to 18 USC 4208(b) and he is undoubtedly correct for cases not involving the above cited statute.

It is obvious that the intent of Congress in enacting Section 4208(b) was twofold: (a) That the original order of commitment is wholly tentative and (b) upon receipt of the study the Judge pronounces a final sentence.

It thus becomes clear that for the purposes of a Motion for a New Trial based on the ground of newly discovered evidence the sentence pronounced upon receipt of the report from the Bureau of Prisons is the final judgment[1]. It is clear that this Court has ruled that the final sentence is pronounced after the report is received, otherwise why would it be necessary for the Defendant to be present[2]. A sentence pursuant to 18 USC 4208(b) is not an ordinary

[1]Rule 33, Fed.R.Crim.P. provides that "a motion for a new trial based upon the grounds of newly discovered evidence may be made only before or within two years after final judgment."

[2]U.S. v. Behrns, 375 US 162, 84 SupCt 295

criminal case since a convicted defendant is sentenced twice.[3]

THE DECISION IN THIS CASE (10th CIRCUIT) IS IN CONFLICT WITH FOUR OTHER CIRCUITS: (1) U.S. v. Duardi (514 F2d 545, 8th Circuit 1975), the defendants were sentenced pursuant to 18 USC 4208(b); they appealed their convictions which were affirmed. After the convictions were affirmed on appeal the trial court noted its receipt and evaluations and recommendations pursuant to Section 4208(b). The government filed notice pursuant to special offenders act. The Court dismissed said notice and the government appealed prior to defendant being sentenced. The court said at page 547:

> **"The parties agree and it is clear from the record that the trial judge has not yet entered the final sentences on the conspiracy convictions. Rather, under 18 USC 4208(b), he has merely placed the defendants in the custody of the Attorney General for study and recommendation. By the very terms of that statute he may now place the defendants on probation, affirm the term of sentence originally imposed or reduce that sentence. It is, therefore, clear that there has been no "final judgment," as that term is defined in criminal cases, and that an appeal will not lie at this time under 28 USC 1291."**

The Duradi case is on all fours with the Petitioner's.

(2) Walsh v. US, 374 F2d 421 (1967, 9th Circuit) holds that the original commitment under 18 USC 4208(b) is only tentative and that the sentence imposed upon receipt of the final report is the final judgment.

[3]Corey v. US, 375 US 169, 84 SupCt 298

(3) See also U.S. v. Jerry James, 459 F2d 443, (1972, 5th Circuit), and (4) Farries v. U.S., 439 F2d 781 (3rd Circuit) and Bolduc v. U.S., 363 F2d 832 (1966, 5th Circuit).

The Solicitor on Page 4 of his brief cites U.S. v. Smith, 331 US 469 (not on point, where the court on its own motion granted a new trial) and U.S. v. Beran, 546 F2d 1316 (motion for new trial granted more than 7 days after verdict), both not in point.

Rule 32, Fed.R.Crim.P. provides among other things:
(b) Judgment.

> **(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence.**
>
> > **(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 USC 4208(b), 4252, 5010(e), or 5034 shall be considered.**

Particularly pertinent here is the oft-enunciated principle that in criminal cases final judgment means sentence. "The sentence is the judgment." Parr v. United States, 351 US 513, 518, 76 S.Ct.912, 100 L.Ed. 1377 (1956); Berman v. United States, 302 US 211, 212, 58 S.Ct. 164, 82 L.Ed 204 (1937); United States v. Wilson, 440 F.2d 1103, 1104 (5th Cir.), cert. denied, 404 US 882, 92 S.Ct. 210, 30 L.Ed.2d 163 (1971).

If we follow the Solicitor's argument, final sentence under section 4208(b) is not final at all.

In Corey Supra this Honorable Court states as follows:

"At page 302 in footnote 15 in the court opinion.

"Only the final sentence which was later imposed would still have been open, under accepted procedures, to attack in the trial court and review on appeal".

So it is absolutely clear that the Petitioner's final sentence pursuant to Section 4208(b) on February 9, 1976, was a final judgment for the purposes of Rule 33 and would have still been open to review on appeal. Thus the motion for new trial for newly discovered evidence having been filed on February 8, 1978, was timely.

II.

We also urged in our Petition as follows:

> "2. Where petitioner did not appeal to the Circuit Court within the ten days allowed by Federal Rules of Appellate Procedure 4(b) because the clerk failed to notify the petitioner and respondent of the Court's order denying defendant's Motion for New Trial pursuant to Rule 49(c) Fed.R.Crim.P.; and where both parties were notified by the Clerk six and one half months later at the request of the trial judge, may the appeal be perfected either by filing Notice of Appeal within 10 days after receiving actual notice of judgment from the clerk, or in the alternative shall the Court vacate the judgment and enter a new judgment of which notice may be sent and from which appeal may be taken."

Frankly, we were shocked by the Solicitor General's cavalier treatment of the cases he discussed in footnote 3 on page 4 of his memorandum, to-wit: Hill v. Hawes, 320 US 520 (1944) and Rosenbloom vs. US, 355 US 80 (1957) claiming they are no longer in point.

He brushes over the fact that this Honorable Court's own advisory committee comprised of distinguished lawyers in approving the amendment to Rule 49(c) Fed.R. Crim.P. continued to allow the following comment made

by the advisory committee as its interpretation of the amended rule:

> **"but in a case in which the losing party in reliance on the clerk's obligation to send a notice failed to file a timely notice of appeal, it was held competent for the trial judge, in the exercise of sound discretion, to vacate the judgment because of the clerk's failure to give notice and to enter a new judgment, the term of court not having expired. Hill v. Hawes, 64 S.Ct. 334, 320 US 520, 88 L.Ed 283, rehearing denied 64 S.Ct. 515, 321 US 801, 88 L.Ed.1088."**

It is then clear that this Court expressed its intent by adopting said amendment together with the advisory committee's notes.

The Solicitor cites no cases where both parties (as was the case here) had no notice of the trial court's ruling.

The trial court found that the facts in this case arose from an unusual set of circumstances and further stated "there is much to commend this position especially in a case such as the present one." (Pet App D1, D3).

Professor Moore would agree with our position, Moore's Federal Practice, 99 204.4, 204.16.

In this case there was no prejudice to the government and under these circumstances the purpose of justice would not be served by not allowing this appeal.

The citations on Page 11 of our Petition indicate that there has grown up a line of cases in at least four circuits that under circumstances such as ours an appeal has been allowed. We urge these once again.

Apparently the Solicitor concedes that the rule has been applied differently in civil cases.

In Rodriguez v. US, 395 US 327, 89 SCt 1715, 23 LEd 24 340 (1969), at page 1717, Mr. Justice Marshall said,

"As this Court has noted before present federal law has made an appeal from a District Courts' judgment of conviction in a criminal case what is in effect a matter of right."

Here the record shows that the trial judge erroneously failed to advise Petitioner of right to appeal, Fed.R.Crim. P. 37a(2) when he was sentenced under section 4208(b) on February 9, 1976.

Mandatory time limit for Perfecting an appeal doesn't begin to run until defendant is actually notified of his rights. See Farries vs. US, 439 F2d 781 (3rd Circuit, 1971) (Involves a final sentence under section 4208(b), Court found such a sentence was appealable and remanded for vacation so the defendant could file a timely appeal because when he was sentenced under section 4208(b) he wasn't advised of his right of appeal as is the case here.)

Here Petitioner was worse off then civil litigant. Moreover, even appeals not timely has been held sufficient dealing with excusable neglect. See Wolfsohn vs. Hunken, 376 US 203, 84 SCt 699, 11 LEd 2nd 636; Thompson vs Immigration and Naturalization Service, 375 US 384, 84 SCt 397, 11 LEd 29 404; Harris Truck Lines vs. Cherry Meat Packers, Inc., 371 US 215, 83 SupCt 283, 9 LEd 2d 261. Surely the rule in criminal cases should not be more strictly applied. Even more odd is the fact that Petitioner because he had a lawyer is worse off than a defendant who does not have a lawyer.

CONCLUSION

We wouldn't have commented on the merits of the Motion for New Trial but except for the fact of the Solicitor's comment in footnotes 1 and on page 2 of his memorandum where he claims the Motion for New Trial has no merit.

He wants to deny our right to litigate the merits in the circuit, and he attempts to do so in this Court without citation to code or case.

It should also be noted that the Circuit in ruling that a final sentence under section 4208(b) is not a final judgment under Rule 33, thereby ruled on a portion of the trial courts order without actually granting an appeal and without allowing us to argue the point in the Circuit by briefs.

In one breath the Circuit said your appeal is untimely but without giving us the right to argue an appeal ruled on one of our points without our argument but made no comment on the merits of the Motion for New Trial.

Here as we pointed out in our Petition the government in their response to our Motion for New Trial admitted and the Solicitor doesn't quarrel with this:

(a) That this was a case of selective prosecution.

(b) Admitted that the government told the impartial Court-appointed psychiatrist that the Petitioner was a narcotics peddler and had not reported his income therefrom, (all of which was untrue), while the other psychiatrists who were not employed by the government or court-appointed were not given this information thus prejudicing the Petitioner at the trial.

(c) That the Internal Revenue Service in all of their documents which they did not release to Petitioner claimed that the likely source in the net worth tax case was illegal income from narcotics which was untrue, while claiming something else at the trial.

(d) That the Petitioner was made a special target because of his politics by the Bureau of Narcotics and Dangerous Drugs, the Secretary of the Treasury and the Internal Revenue Service.

(e) That the government had in their possession, prior to trial, exculpatory evidence favorable to the defendant but denied Petitioner access to it even upon his request.

(f) The government did not deny that this was newly discovered subsequent to trial.

(g) The government admitted in their response that the Petitioner was under scrutiny as the target of a narcotics investigation and that this involvement led to his indictment.

The grand jury was told that the Petitioner's likely source in net worth income tax was illegal narcotics. This was not the thrust of the government's case during the trial; which would have been expulcatory had Petitioner known this. In other words, the grand jury was told one thing and the thrust of the trial was entirely different. In fact the truth is that Petitioner was never at any time involved in narcotics.

All of these matters were entitled to be heard on the merits.

For the reasons stated, it is respectfully requested that this Court grant a Writ of Certiorari and reverse the judgment of the 10th Circuit summarily and order the trial court to hear arguments on the Motion for New Trial or in the alternative, calendar the case for argument on the merits.

Respectfully submitted,

Ben Klein
Pro Se
1738 Pearl Street
Denver, CO 80203
(303) 861-7191